



not discharge, but also to impose liability that is in excess of its statutory authority. Here, the “duty to apply,” as it applies to CAFOs that have not discharged, and the imposition of failure to apply liability is an attempt by the EPA to create from whole cloth new liability provisions. The CWA simply does not authorize this type of supplementation to its comprehensive liability scheme. Nor has Congress been compelled, since the creation of the NPDES permit program, to make any changes to the CWA, requiring a non-discharging CAFO to apply for an NPDES permit or imposing failure to apply liability.

The Fifth Circuit upheld the provisions of the 2008 rule that allow permitting authorities to regulate a permitted CAFO’s land application and include these requirements in a CAFO’s NPDES permit because challenges were time-barred, and dismissed the poultry petitioners’ challenge of the guidance letters for lack of jurisdiction because the letters merely restated the law and had no effect on the party’s rights or obligations and thus not reviewable final actions.

- See *National Pork Producers, et al. v. U.S. EPA*, No. 08-61093 (Fifth Cir., Mar. 15, 2011).

## LINKS

- [Mary Ellen Ternes' Bio](#)
- [McAfee & Taft RegLINC - May 2011](#)
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